83-1286

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1983

DIRECTOR, Illinois Department Of Corrections,
Petitioner,

vs.

PAULA GRAY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NEIL F. HARTIGAN
Attorney General
State of Illinois,
188 West Randolph Street,
Suite 2200,
Chicago, Illinois 60601,
Attorney for Petitioner.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
Room 500 Richard J. Daley Center,
Chicago, Illinois 60602,

MICHAEL E. SHABAT,*
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.
* Counsel of Record
(312) 443-5496

The Scheffer Press, Inc.—(312) 263-6850

QUESTIONS PRESENTED

Whether the Court of Appeals should have vacated a state murder conviction in habeas corpus proceedings on grounds which were not considered by the District Court, raised on appeal or briefed by the parties.

Whether a federal court, when it feels that a prompt retrial would be just, may waive the requirement that a habeas corpus petitioner exhaust state remedies.

Whether representation of co-defendants by a single attorney is barred when there is a theoretical possibility, not proven at any hearing, that one of the defendants could have benefited by cooperating with the prosecution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No.

DIRECTOR, Illinois Department Of Corrections,
Petitioner,

vs.

PAULA GRAY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

Petitioner, the Director, Illinois Department of Corrections, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *United States ex rel. Gray* v. *Director, Department of Corrections, State*

of Illinois, 731 F.2d 586 (7th Cir. 1983). It is reproduced as Appendix A of this petition. The order of the Court of Appeals denying a rehearing is reproduced as Appendix B of this petition.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. ¶1254(1). The opinion of the United States Court of Appeals for the Seventh Circuit was filed on November 16, 1983. A timely petition for rehearing was filed and was denied on December 22, 1983. This petition is filed within 90 days of the denial of the rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Sixth Amendment:

> In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

2. 28 U.S.C. ¶¶2254(b), 2254(c):

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he had the right under the law of the State to raise, by any available procedure, the question presented.

3. Illinois Post-Conviction Hearing Act (Ill. Rev. Stat., Ch. 38, sec. 122-1):

> Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States . . . may institute a proceeding under this Article.

STATEMENT OF THE CASE

Respondent Paula Gray was convicted in the Illinois courts of the crimes of murder, rape and perjury. Her convictions were affirmed on appeal, but she failed to file a petition in the state courts for post-conviction relief. Respondent did file a petition for a writ of habeas corpus in federal court. That habeas corpus petition was dismissed for failure to exhaust state remedies. The Court of Appeals for the Seventh Circuit reversed, and, after considering the merits of the hebeas corpus petition, remanded with directions that the petition be granted.

Respondent Paula Gray was a co-defendant of two respondents whose cases are now before this Court on petitions for writs of certiorari. *People* v. *Dennis Williams,* No. 82-1691; *People* v. *Willie Rainge,* No. 83-147. Respondent was tried before a separate jury, however, and the evidence against her was stronger than the evidence against her co-defendants. Specifically, respondent confessed on several occasions to participation in the gang rape of Carol Schmal and the murder of Miss Schmal and Larry Lionberg.

At about 2:30 a.m., on May 11, 1978, Larry Lionberg and his girlfriend Carol Schmal were kidnapped at a gas station in Homewood, Illinois. Money and other items had been taken from the station, where Lionberg had

been working as an attendant. The next day the dead bodies of Lionberg and Schmal were discovered at an abandoned building in East Chicago Heights, Illinois. Both had been shot to death. Carol Schmal's body was naked from the waist down, and there was medical evidence indicating that she had been raped.

Respondent gave accounts of her participation in these crimes to a police officer, to an assistant state's attorney, and to the Cook County grand jury. All three accounts were essentially the same. Respondent had not been present when Larry Lionberg and Carol Schmal were kidnapped, but she had been present when both were murdered. She had held a cigarette lighter to illuminate the scene while Carol Schmal was gang raped and shot to death.

At about 3:00 a.m. on May 11, respondent had been near the abandoned building in East Chicago Heights together with her boyfriend, co-defendant Kenneth Adams. She saw several men, including co-defendants Dennis Williams and Willie Rainge, force Larry Lionberg and Carol Schmal out of a car. Then Dennis Williams went over to respondent, grabbed her by the arm, and told respondent to come with them. Everyone then went into the abandoned building. While Larry Lionberg was held downstairs, Carol Schmal was taken to an unlit bedroom on the second floor.

As the bedroom was very dark, Dennis Williams told respondent to light and hold a Bic lighter to illuminate the scene. Respondent held the lighter, periodically relighting it, while four men raped Carol Schmal. Respondent continued to hold the lighter while three of the men raped Carol Schmal again. Kenneth Adams refrained from raping Miss Schmal a second time because respon-

dent asked him not to. Then, as respondent continued to hold the lighter, Dennis Williams turned Carol Schmal over and shot her to death.

Respondent, Dennis Williams and Willie Rainge then took Larry Lionberg to a field near the abandoned building. Respondent watched while Williams and Rainge shot Lionberg to death.

Respondent was not arrested or charged after the police first learned of her involvement in the murders. Instead it was the intention of prosecution to use respondent as a witness against the other offenders. For that reason respondent was called as a witness before the grand jury. However, respondent was never granted any kind of immunity.

But at a preliminary hearing on June 19, 1978, respondent repudiated all her statements incriminating the other offenders, and claimed that she had been forced to lie by the prosecutors. It was discovered that before the preliminary hearing respondent and her family had moved into the home of Dennis Williams. Respondent had arrived at the preliminary hearing in the company of Archie Weston, the attorney for Dennis Williams and Willie Rainge.

There is no evidence that after the preliminary hearing on June 19, the prosecution ever attempted to plea bargain with respondent or ever attempted to gain her cooperation against the other offenders. Nor is there any evidence that respondent ever indicated any interest in plea bargaining with the prosecution. On September 1, 1978, respondent was indicted for murder, rape and perjury. Shortly thereafter attorney Archie Weston entered an appearance for respondent. At no time before

September 1 had attorney Weston ever appeared as respondent's attorney.

At the trial in this case respondent and co-defendants Williams, Rainge and Adams all presented consistent defenses. All claimed that they were not present at the time of the murders and had no involvement in them. All defendants were convicted, Williams was sentenced to death, and respondent and the other defendants received long prison terms.

Respondent's conviction was affirmed on appeal. *People* v. *Gray*, 87 Ill. App.3d 142, 408 N.E.2d 1150 (1st Dist. 1980). She then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. *United States ex rel. Paula Gray* v. *Director, Department of Corrections, State of Illinois*, 81 C 4545. The District Court dismissed the petition, ruling that respondent had failed to exhaust state remedies in that she had not filed a petition under the Illinois Post-Conviction Hearing Act. Ill. Rev. Stat., Ch. 38, sec. 122-1 *et seq.*

Respondent appealed to the United States Court of Appeals for the Seventh Circuit, solely on the issue of whether she had exhausted her state remedies. No other issue was briefed by the parties. But the Seventh Circuit went directly to the merits of the habeas corpus petition, and ruled that it should have been granted. The matter was remanded with directions that respondent be released or retried.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS SHOULD NOT HAVE VACATED A STATE MURDER CONVICTION ON GROUNDS NOT CONSIDERED BY THE DISTRICT COURT, RAISED ON APPEAL, OR BRIEFED BY THE PARTIES.

In this case the Court of Appeals vacated a state murder conviction without ever giving the state a chance to defend the validity of that conviction. The sole question considered by the District Court was whether respondent had exhausted her state remedies. Exhaustion of state remedies was the sole question raised or briefed by the parties in the Court of Appeals. At no time was petitioner ever given notice that the Court of Appeals would consider the merits of the habeas corpus petition, and at no time was petitioner ever given an opportunity to brief the question of whether respondent had been deprived of effective assistance of counsel. In effect the State of Illinois has been condemned unheard.

The Court of Appeals erred when it vacated respondent's convictions on grounds neither raised by respondent or briefed by either party. *Strunk* v. *United States*, 412 U.S. 434, 437 (1973). Review of state convictions in federal-habeas corpus actions entail great "finality problems and special comity concerns." *Engle* v. *Issac*, 456 U.S. 107, 134 (1982). It was a violation of federal state comity to vacate respondent's murder conviction without ever giving the State of Illinois a chance to defend that conviction.

The briefs of the parties in the Court of Appeals were directed solely to the question of whether respondent had exhausted her state remedies, and never discussed the merits of respondent's habeas corpus petition. The Argument section of respondent's brief as appellant in the Court of Appeals was only three pages long, and the single issue discussed was exhaustion of state remedies. The sole argument heading in respondent's brief was as follows:

> The District Court Erred In Dismissing The Instant Habeas Corpus Petition By Misapplying The Rule Announced in *Rose* v. *Lundy*.

Rose v. *Lundy*, 455 U.S. 509 (1982), of course, deals solely with the question of exhaustion of state remedies. Thus the merits of the habeas corpus petition were never before the Court of Appeals, and the court erred in deciding a question which was not before it.

Perhaps it would not have mattered that the Court of Appeals decided an issue neither raised nor briefed by the parties if that court had correctly stated and applied the law. But that is not the case. The opinion of the Court of Appeals contains an elementary but important mistake concerning Illinois law.

The Court of Appeals held that, because respondent's attorneys also represented her co-defendant, respondent's attorney could not have asserted the defense of coercion at trial. But coercion or compulsion is no defense to a charge of murder in Illinois. Ill. Rev. Stat. 1977, ch. 38, sec. 7-11(a); *People* v. *Gleckler*, 82 Ill. 2d 145, 411 N.E.2d 849 (1980). As the Illinois Supreme Court said in *Gleckler*: "The defence of compulsion, therefore, as a matter of legislative intent, is unavailable to one charged

with murder." 82 Ill. 2d at 157, 411 N.E. 2d at 854. The Court of Appeals erred when it held that respondent could have benefited by asserting the defense of coercion, or compulsion as it is called in Illinois, at her state murder trial.

The error is important, because the failure to assert the defense of compulsion is the *only* way in which the Court of Appeals suggests that respondent was prejudiced at trial by the fact that she had the same attorney as her co-defendants. The other prejudice suggested by the Court of Appeals concerns hypothetical pretrial plea bargaining. In fact the defenses used by respondent and her co-defendants were entirely consistent, and there is no way in which respondent could have benefited at trial by having a different attorney.

Thus the Court of Appeals vacated a state murder conviction in part because of an erroneous conclusion concerning Illinois law. There are other ways in which Court of Appeals suffered by considering issues not raised or briefed by the parties. The Seventh Circuit's opinion relied heavily on the fact that Illinois reviewing courts, after respondent's conviction was affirmed, reversed the convictions of respondent's two co-defendants. *People* v. *Williams*, 93 Ill.2d 309, 444 N.E.2d 136 (1982); *People* v. *Rainge*, 112 Ill. App.3d 396, 445 N.E.2d 535 (1st Dist. 1983). However, the Seventh Circuit was not informed, and did not note, that those decisions are now before this Court on petitions for certiorari. *People* v. *Williams*, No. 82-1691; *People* v. *Rainge*, No. 83-147. More importantly, the Court of Appeals did not consider the fact that the *Williams* and *Rainge* opinions gave respondent a basis for seeking state post-conviction relief.

Finally, none of the facts as given in the opinion of the Court of Appeals can be considered reliable, since petitioner has never been given an opportunity to present evidence in any brief or hearing.

In general it is the business of a reviewing court to consider the issues decided by the court below and raised by the parties on appeal. *Swenson* v. *Stidham,* 409 U.S. 224, 231 (1972); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 334 fn. 10 (1963). Therefore, the Court of Appeals in this case should not have decided a question which was not reached by the District Court, raised by respondent on appeal, or briefed by the parties. This is particularly true since in habeas corpus proceedings a state conviction is presumed to be valid, and should not be lightly vacated. *Barefoot* v. *Estelle,* 103 S.Ct. 3383, 3391 (1983).

Respondent was convicted on overwhelming evidence of participation in a gang rape and double murder. The State of Illinois should be given a chance to defend the validity of that conviction. Accordingly, a writ of certiorari should issue to review the decision of the Court of Appeals. Two other forms of relief are possible. The decision of the Court of Appeals could be summarily vacated and the matter remanded with directions to either affirm the District Court on the issue of exhaustion of state remedies or to remand to the District Court for a ruling on the merits of the habeas corpus petition. At a minimum, the matter should be remanded to the Court of Appeals with directions to permit the parties to brief the merits of respondent's habeas corpus action.

II.

THE COURT OF APPEALS HAD NO AUTHORITY TO WAIVE THE REQUIREMENT THAT RESPONDENT EXHAUST HER STATE REMEDIES BEFORE SEEKING FEDERAL HABEAS CORPUS RELIEF.

Although the sole issue raised by respondent on appeal concerned exhaustion of state remedies, the Court of Appeals did not discuss that issue until the end of its opinion. The discussion of the exhaustion question by the Court of Appeals is by no means clear, but a fair reading of the opinion indicates that the Seventh Circuit simply waived the requirement that respondent exhaust her state remedies before seeking federal habeas corpus relief. The Court of Appeals had no legal authority to do this.

This issue is an important one to the federal court system, justifying a grant of certiorari. This court should determine that a habeas corpus petitioner must exhaust state post-conviction remedies before seeking federal relief.

The key language of the Court of Appeals on the exhaustion question is as follows (Appendix A, p. 24a-25a):

> Nevertheless, the District Court held that the petition raised unexhausted claims because (1) suggestions of improprieties "truly deserve a hearing", (2) there should be a hearing in which counsel can defend himself against serious charges; and (3) that state courts should be given the first chance to conduct such a hearing.
>
> We believe that under the circumstances here present-especially the grant of new trials by the Illinois Courts to Williams and Rainge *after* the decision of the District Court in the case at bar—these reasons are not sufficient to require Paula to

> attempt to secure post-conviction relief in the Illinois courts. In making this determination, we have in mind that considerable lapse of time since the crimes were committed and since the date of the conviction. The interests of justice will be better served if the new trial can be conducted with reasonable promptness.

In other words the Court of Appeals held that respondent would not be required to exhaust her state remedies because that court felt that it would be more just to have a prompt retrial. The Seventh Circuit dismissed as inappropriate the concern of the District Court that ". . . the state courts should be given the first chance to conduct . . . a hearing." (Appendix A, p. 25a) But a concern that the state courts given the first chance to conduct a hearing is the essence of the requirement that a convicted defendant exhaust state remedies before seeking federal habeas corpus relief.

There are no relevant exceptions to the requirement that state remedies be exhausted before a state conviction may be challenged in federal habeas corpus proceedings. Exhaustion of state remedies is required both by the Habeas Corpus Act and by explicit decisions of this Court. Therefore, the Court of Appeals violated the law when it vacated respondent's conviction without requiring that she exhaust her state remedies.

The Habeas Corpus Act states as follows: (28 U.S.C. ¶¶2254(b), 2254(c)):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is

> an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of this section, if he had the right under the law of the State to raise, by any available procedure, the question presented.

This Court had consistently enforced the requirement that a habeas corpus petitioner first exhaust state remedies. *Rose* v. *Lundy,* 455 U.S. 509 (1982); *Pritchess* v. *Davis,* 421 U.S. 482 (1975); *Nelson* v. *George,* 399 U.S. 224 (1970).

In fact respondent had an available state remedy through which she could have raised the issue of whether her trial attorney labored under a conflict of interest. The Illinois Post-Conviction Hearing Act provides that "Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was substantial denial of his rights under the Constitution of the United States . . . may institute a proceeding under this Article." Ill. Rev. Stat. 1977, ch. 38, sec. 122-1. If a petition under the Post-Conviction Hearing Act establishes that a defendant was convicted in violation of his federal constitutional rights, then he must be granted a retrial or other appropriate relief. Ill. Rev. Stat., ch. 38, sec. 122-6. Thus the Post-Conviction Hearing Act provides a remedy which is similar to a federal habeas corpus petition. Respondent never filed a state post-conviction petition, so she had failed to exhaust her state remedies.

Specifically, in an Illinois post-conviction proceeding a petitioner may assert that his trial attorney was sub-

ject to a conflict of interest. *People* v. *Meyers*, 46 Ill. 149, 263 N.E.2d 81 (1970). The Court of Appeals should have required respondent to assert that claim in a state post-conviction petition before seeking federal relief.

It is true that in Illinois post-conviction proceedings matters which have been decided on direct appeal are *res judicata* and will not be reconsidered. *People* v. *Stepheny*, 46 Ill. 2d 153, 263 N.E.2d 83 (1970). However, *res judicata* will not bar an Illinois post-conviction petition when that petition is based on matters which were not considered or could have been considered on a direct appeal from the conviction. *People* v. *Edmonds*, 79 Ill. App.3d 33, 398 N.E.2d 230 (1st Dist. 1979). In fact, the rule of *res judicata* will be relaxed in Illinois post-conviction proceedings whenever "fundamental fairness" requires that it be relaxed. *People* v. *Partin*, 69 Ill.2d 80, 370 N.E.2d 545 (1977); *People* v. *Ruiz*, 24 Ill. App.3d 449, 321 N.E.2d 746 (1st Dist. 1974).

Therefore, the grounds on which the Court of Appeals vacated the respondent's murder conviction could have been asserted in a state post-conviction proceeding. The Court of Appeals relied on the fact that Illinois reviewing courts had vacated the convictions of respondent's co-defendants. *People* v. *Williams*, 93 Ill.2d 309, 444 N.E. 2d 136 (1982); *People* v. *Rainge*, 112 Ill. App.3d 396, 445 N.E.2d 535 (1st Dist. 1983). But that fact could not have been considered in respondent's direct appeal, since the *Williams* and *Rainge* decisions were handed down after respondent's direct appeal was decided. *People* v. *Gray*, 87 Ill. App.3d 142, 408 N.E.2d 1150 (1st Dist. 1980). In addition, in Illinois post-conviction proceedings an evidentiary hearing may be held to determine if a defendant in a criminal case had been deprived of effec-

tive assistance of counsel. *People* v. *Sigafus*, 39 Ill.2d 68, 233 N.E.2d 386 (1968). An evidentiary hearing is the usual means to determine whether a defense attorney in a criminal case was subject to a conflict of interest. *Wood* v. *Georgia*, 450 U.S. 261 (1981). No such hearing has yet been held in Illinois courts, so of course no such hearing was reviewed on respondent's direct appeal. The Court of Appeals, rather than voiding respondent's conviction, should have given the Illinois courts a chance to hold a hearing on whether an actual conflict of interest existed in respondent's representation at trial.

In conclusion, the Court of Appeals should not have waived the requirement that respondent exhaust her state remedies. Respondent could have filed a state post-conviction petition asserting that the convictions of her co-defendants had been reversed and demanding an evidentiary hearing on whether she received effective assistance of counsel at trial. The questions of whether a habeas corpus petitioner must exhaust state post-conviction remedies is an important one which should be resolved by this Court. Therefore, this Court should grant certiorari in order to determine whether petitioner was required to pursue state post-conviction remedies before seeking federal habeas corpus relief.

III.

UNDER THE RULE OF *CUYLER V. SULLIVAN* THE RECORD IN THIS CASE DOES NOT PROVE AN ACTUAL CONFLICT OF INTEREST.

The Court of Appeals voided respondent's conviction largely because it felt that respondent could have benefited by plea bargaining with the prosecution and by offering to cooperate with the state against her co-defendants.

But there is no evidence that after respondent was indicted the state had any interest in plea bargaining with her or that she had any interest in plea bargining with the state. In fact it is more reasonable to conclude that, after respondent repudiated her statements incriminating herself and her co-defendants, the prosecution lost all interest in plea bargaining with her. Since there has never been an evidentiary hearing proving that respondent was prejudiced by multiple representation, the Court of Appeals erred in vacating her conviction. *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980).

This case presents an important question concerning interpretation of the Sixth Amendment, justifying a grant of certiorari. This Court should determine whether a *per se* conflict of interest exists when a single attorney represents co-defendants and there is a theoretical possibility, not proven at any hearing, that one of the co-defendants could benefit by cooperating with the prosecution.

Respondent was indicted more than two months after she had repudiated her incriminating statements and had claimed to know nothing about the murders. Her trial attorney entered an appearance on her behalf only after the indictment. The opinion of the Seventh Circuit suggests three ways in which respondent could have prejudiced by multiple representation. (Appendix A, p. 22a):

1. Her trial attorney might have been prevented from asserting the defense of coercion;

2. Her trial attorney might have been inhibited in asserting at sentencing that respondent played a small role in the rape and murders;

3. Her trial attorney might have been inhibited in plea bargaining with the state in return for respondent's cooperation against her co-defendants.

The first of these three suggestions is based on a misstatement of Illinois law. Coercion or compulsion is no defense to a charge of murder in Illinois. *People* v. *Gleckler*, 82 Ill. 2d 145, 411 N.E.2d 849 (1980). The second of these three suggestions is irrelevant to the validity of respondent's conviction, since at most it could justify a new sentencing hearing. Therefore, respondent's convictions for murder, rape and perjury were vacated solely because of a theoretical possibility that, after the indictment, respondent could have benefited by offering to cooperate with the prosecution against her co-defendants. Since there is no evidence that the prosecutors had any desire to plea bargain with respondent after she was indicted, there is no proof in the record that respondent was prejudiced by multiple representation.

After all, in almost every criminal case involving co-defendants, there is theoretical possibility that one defendant might benefit by testifying against another. But that possibility alone should not make representation of co-defendants by a single attorney illegal. It is true that in this case the prosecution had originally intended to use respondent as a witness against the other offenders. But that plan was thwarted when respondent at a preliminary hearing repudiated all the statements she had given incriminating the defendants. After that her value as a potential witness almost vanished. Her testimony repudiating her prior statements showed that the prosecution could not rely on her. In addition, even if respondent had agreed to testify as a state's witness, she could have been impeached by her testimony from

the preliminary hearing. It is far more likely than not that after respondent was indicted the prosecutors neither wanted to plea bargain with respondent nor thought that they had anything to gain by trying to secure her cooperation.

The truth of this matter could have been discovered through an evidentiary hearing to determine if respondent's trial attorney was subject to an actual conflict in interest. Evidence could have been taken concerning whether, after respondent was indicted, there was any possibility that she could have benefited by trying to plea bargain with the prosecutors. But the Court of Appeals refused to order an evidentiary hearing either in federal district court or in state court. Thus the Court of Appeals erred when it vacated respondent's conviction without evidence of an actual conflict of interest.

This Court's decision in *Cuyler* is in point on this issue. *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). In that case the same attorneys represented three co-defendants. One of the defendants, after being convicted of murder, petitioned for habeas corpus. He alleged that he had been prejudiced by multiple representation, and there was evidence that his attorneys at trial had rested without calling witnesses in order to protect the interests of the two co-defendants. Nevertheless, this Court held that the facts did not establish a *per se* conflict of interest, and that the defendant could obtain relief only on a showing of actual prejudice. This Court said:

> We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. 446 U.S. at 350.

Therefore, respondent here was entitled to relief only if it could be found after an evidentiary hearing that she was actually prejudiced after her indictment by having the same attorney as her co-defendants.

The same conclusion is required by *Wood* v. *Georgia*, 450 U.S. 261 (1981). In that case certain employees in a state obscenity prosecution were represented by the same attorneys as their employers. This Court held that the situation created a possibility of a conflict of interest, and remanded for an evidentiary hearing in state court on whether an actual conflict of interest existed. The Court of Appeals erred in this case by refusing to follow this Court's decision in *Wood*. Instead of finding a *per se* conflict of interest, the Court of Appeals at most should have remanded for an evidentiary hearing on whether an actual conflict of interest existed in respondent's representation at trial.

The decision of the Court of Appeals also conflicts with the decision of this Court in *Dukes* v. *Warden*, 406 U.S. 250 (1972). In that case an attorney represented three co-defendants who each pled guilty. The attorney sought leniency for two of the defendants on the grounds that they had been misled by the third defendant and had cooperated with the prosecution against the third defendant. This Court held that the third defendant had not been deprived of effective assistance of counsel, since there was no evidence that the representation afforded the third defendant had been affected in any way by his attorney's efforts on behalf of the co-defendants. Similarly, there is no actual evidence that respondent here was prejudiced by having the same trial attorney as her co-defendants.

In fact, representation of co-defendants at trial by a single attorney is a common event in criminal cases in

both state and federal court. When, as here, the defendants have consistent defenses at trial, they may benefit by having a single attorney to coordinate their defense. The Court of Appeals held that multiple representation is barred when one defendant might benefit by co-operating with the prosecution against a co-defendant. That rule would bar multiple representation in most cases. Of course, if there is evidence of an actual conflict of interest causing prejudice to a defendant, then there are grounds to vacate a conviction. But the Court of Appeals here found evidence of an actual conflict to be unnecessary, since it voided respondent's conviction outright without remanding for an evidentiary hearing on whether an actual conflict of interest existed.

This Court has attempted to define the law governing multiple representation and conflicts of interest. *Wood* v. *Georgia*, 450 U.S. 261 (1981); *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980); *Holloway* v. *Arkansas*, 435 U.S. 475 (1978); *Dukes* v. *Warden*, 406 U.S. 250 (1972). The question is an important one to the administration of criminal justice. This Court should grant certiorari in order to establish that a mere possibility that one defendant might benefit by cooperating with the prosecution against a co-defendant is insufficient to void a conviction in the absence of evidence of an actual conflict of interest.

CONCLUSION

Petitioner respectfully prays that this Honorable Court grant a petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Or, in the alternative, petitioner prays that the decision of the Court of Appeals be summarily vacated, and that the matter be remanded to the Court of Appeals with directions to either affirm the judgment of the District Court on the exhaustion issue or remand to the District Court for a hearing on the merits of the petition for a writ of habeas corpus.

Or, in the alternative, petitioner prays that the decision of the Court of Appeals be summarily vacated, and that the matter be remanded to the Court of Appeals with directions to permit the parties to brief the merits of the petition for a writ of habeas corpus.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois,
188 West Randolph Street,
Suite 2200,
Chicago, Illinois 60601,
Attorney for Petitioner.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
Room 500 Richard J. Daley Center,
Chicago, Illinois 60602,

MICHAEL E. SHABAT,*
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.
* Counsel of Record

(312) 443-5496

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit in *United States ex rel. Gray* v. *Director, Department of Corrections, State of Illinois,* 731 F. 2d 586 (7th Cir. 1983).

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 82-2940

UNITED STATES OF AMERICA, ex rel. Paula Gray,
Petitioner-Appellant,

vs.

DIRECTOR, DEPARTMENT OF CORRECTIONS, STATE OF ILLINOIS,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 C. 4545—SUSAN GETZENDANNER, *Judge.*

Argued May 25, 1983—Decided November 16, 1983

Before, WOOD and CUDAHY, *Circuit Judges,* and WYATT, *Senior District Judge.**

WYATT, *Senior District Judge.* This is an appeal by Paula Gray ("Paula"), in custody of the respondent, Director, Department of Corrections, State of Illinois, from an order of the District Court dismissing on motion a

* The Honorable Inzer B. Wyatt, Senior District Judge for the Southern District of New York, is sitting by designation.

petition for a writ of habeas corpus for failure to exhaust available state remedies. 28 U.S.C. § 2254 (b). Paula was sentenced on February 22, 1979, in the Circuit Court of Cook County, Illinois, after a jury had found her guilty of murder, rape, and perjury; her part was that of an aider and abettor. The sentence was imprisonment for concurrent terms of 50 years each for two murders and for rape, and of ten years for perjury.

By order filed May 6, 1982, the District Court *denied* motion of respondent to dismiss the petition. The reasons for the denial are said in the order to have been "stated in open court". The record does not contain any transcript of what was "stated in open court".

The District Court later changed its decision. By order with opinion filed October 18, 1982, the motion of respondent to dismiss the petition was *granted* on the ground that Paula had not exhausted state remedies.

This appeal followed and, the District Court having issued a certificate of probable cause, there is jurisdiction in this Court of the appeal under 28 U.S.C. § 2253.

We reverse the order of dismissal of the District Court.

1.

On Thursday, May 11, 1978, related and revolting crimes were committed in the Homewood and East Chicago Heights sections of Chicago. About five months later, three of the four men who committed these crimes and Paula, who aided and abetted them, were convicted by jury verdicts. One man was sentenced to death; one man was sentenced to life imprisonment; one man and Paula were sentenced to long prison terms. Almost five years later, the Illinois state courts and the federal courts are still dealing with these convictions. Because of Paula's perjury, one man escaped prosecution altogether.

In the early hours of May 11, 1978, a young man was abducted at gunpoint from a Homewood gasoline sta-

tion where he was employed and which was robbed and looted. His fiancee, visiting him at his job, was also abducted. The two young people were taken some five miles away to an abandoned apartment, part of a housing complex where Paula and her family and Dennis Williams and his family lived as close neighbors. In the abandoned apartment, while Paula held a lighter for the men to see, the young woman was raped by Williams, Rainge, Adams, and Jimmerson; Williams then shot the young woman to death. The young man was next taken to a nearby field, with Paula in attendance. Williams shot the young man twice in the head and handed his gun to Rainge who shot the young man in the back. Williams and Paula went to a creek close at hand where Williams threw away the gun which had been used. Williams at this point told Paula not to tell the police what she had seen or he would kill her and her family.

The bodies of the victims were found on Friday, May 12. Investigation led first to Williams and Jimmerson who were arrested near the place of the murders and taken to Homewood police station for questioning. In the evening of May 12 Adams and Rainge were also questioned at the police station. They and Jimmerson were released on the same evening, to be rearrested a few days later. Williams was never released.

2.

As to Paula, she was not subject to the death penalty under Illinois law because she was not 18 years old when the murders were committed. Ill. Rev. Stat. ch. 38, § 9-1(b). Williams, Rainge, Adams, and Jimmerson were each subject to the death penalty because they were above the age of 18 when the murders were committed.

3.

Paula, her mother, her twin sister, and five younger brothers and sisters lived at 1525 Hammond Lane in the housing complex already mentioned. Paula not only had

known Williams and his family for some time, but had also known the other three men who were shown by the evidence to have committed the crimes.

Paula and her twin sister were born June 27, 1960, and were the only children of Mrs. Gray by a Mr. Love. As recited in the presentence report: "The defendant, her sister, and the other children were raised by their mother. The mother has been on Public Aid." (Record, Volume I, p. C 62). The affidavit of Paula, made to obtain assigned counsel after her sentence in February, 1979, recites that she then had no money and no other property of any description. It is evident from the record that Paula and her family were, and for some time had been, indigent.

The record contains a report on Paula from the Cook County Office of Special Education dated September 29, 1969. This gives her Wechsler Intelligence Quotient (IQ) as 65 verbal, 57 performance, 57 full. The report states that Paula has "limited intellectual capacities in really all spheres of function [and] continues to be in need of and to remain eligible for EMH classroom placement." (EMH is understood to be an abbreviation for "Educable Mentally Handicapped"). A similar report in the record, dated June 12, 1974, shows an IQ of 69 verbal, 67 performance, and 64 full, with continued EMH classification. These figures classify Paula as mentally retarded (Stedman's Medical Dictionary 1224 (5th unabr. law. ed. (1982)).

4.

On Saturday, May 13, Officer Pastirik and other officers went to 1525 Hammond Lane. They spoke to Paula for the first time. She was there with younger children, but neither her mother nor twin sister Paulette was at home. Pastirik told Paula that they were looking for a pair of woman's boots; she consented to a search and in a closet the officers found a pair of boots which Paula said belonged to her sister Paulette. They told

Paula they were taking the boots, but when her mother returned, to ask her mother to telephone them. Paula said the Grays had no telephone. The officers then said that if her mother had any question about the boots or anything else to have her come to the police station.

5.

At about 7:30 in the evening of May 13, Paula, her mother, Paulette, and younger brothers and sisters, came to the police station by their own chosen transportation; no police officer brought them.

Two officers spoke to Paula in an office at the station. Although she was not in custody, one officer explained to Paula her constitutional rights, reading from a card for the purpose. She indicated ("made some vague statements") that she would talk to them. (T 1054; "T" references are to pages of the stenographic transcript of the trial, which transcript includes also the suppression hearing which occurred during the trial). Paula "seemed scared" (T 1055). The officers asked her about this and she told them that "she was afraid of Dennis Williams" (T 1055-56).

The officers then left Paula, went to her mother and told her that Paula had information about the crimes but seemed frightened. The mother asked to see Paula. The officers took her to the office and left her alone with Paula. Some minutes later the officers went back to them and "Mrs. Gray said that Paula would cooperate" (T 1058). Mrs. Gray stayed with her and "kept saying [to Paula] to cooperate with the police" (T 1059). The officers asked who was there when the crimes were committed and Paula gave them the names of Williams, Adams, and Rainge; later she gave them the name of Jimmerson.

Meanwhile, Officer Pastirik had been talking to Paulette in another office. After a discussion, Paulette told the officer that Paula did know about the crimes, that Paula

was present when they took place, and that Paula had told her (Paulette) about them on Thursday morning, May 11, about eleven o'clock, some seven or eight hours after they had occurred.

Pastirik then went with Paulette to the office where Paula and her mother were with the other two officers, who left. Pastirik, Paula, her mother, and Paulette remained. Paulette explained that she had told Pastirik "what happened, who shot them. I told him everything" (T 1219). She urged Paula: "for Mom, for everybody tell them everything" (T 1219). Then Paula told Pastirik "everything"; "Paula ran down the entire incident to me at that time" (T 1219). The information Paula told Pastirik was to become her testimony before a grand jury a few days later on May 16.

Mrs. Gray, the mother, confirmed that at the police station on May 13 she had told Paula "not to worry and just tell the police the truth" (T 1177). Paula herself admitted that her mother had told her "to trust the police and to tell them the truth" (T 978, 979).

About midnight May 13-14, Paula and three police officers went to the scene of the crimes. They looked at the apartment where the young woman had been raped and killed and Paula pointed out where the victim had lain. Paula showed them another empty apartment where she had been when she saw the arrival of Williams and others with the victims. Paula walked with the officers to the creek near where the young man was shot and Paula pointed out where Williams had thrown the gun into the water. They then returned to the police station.

While the officers were with Paula on the trip to the scene, she described the crimes to them. As to the disposal of the gun, one of the officers testified to what she said: "She explained that Dennis Williams took her to the creek to throw the gun in. Dennis held her by the hand real tight and made her go to the creek" (T 1085).

In the early hours of Sunday, May 14, a State's Attorney, DiBenedetto, arrived at the police station. About 3:00 a.m. he talked to Paula, her mother, and Pastirik in an office. Paula described the crimes to DiBenedetto and (again) to Pastirik, after which they left Paula and her mother.. At about 7:30 in the morning of May 14, Sala (a police officer) drove Paula, her mother, and DiBenedetto to the Gray apartment in East Chicago Heights. They went into the nearby apartment where the young woman was killed but Paula seemed tired and the officers suggested that she and her mother go to their home and sleep, which they did.

6.

Paula and the Gray family had no further contact with the police investigators until late Monday afternoon, May 15, when Paula met with State's Attorney Johnson, State's Attorney Hardiman (a woman), and police investigators. Johnson was the senior and the coordinator. Paula appeared frightened and said that "she was afraid for the safety of herself and her family" (T 1158). The State's Attorneys told her that their office could protect her and her family and could relocate them. They told her of her rights, including the right to counsel and that if she could not afford a lawyer, they could get one for her at the County's expense. They told her that she appeared herself to be involved in the crimes. Paula then told again how the crimes took place and who committed them. When she had finished, Johnson told her that he believed, from what she had said, that she was in jeopardy in the community where she lived from relatives of Williams, Jimmerson, Rainge, and Adams (all of whom by then were in custody). Johnson suggested that the State "put her up for the night" and thus "isolate her from that community" (T 1261). Johnson explained that he expected to have time the next morning before a grand jury and that he wanted Paula to repeat before the grand jury what she had told him about the crimes. Paula agreed that perhaps it

would be best for her not to go back into the community at that time and to be put up overnight by the State. This was done, and it was arranged for her to stay the night of May 15 at the Holiday Inn at Harvey, a female officer "staying with and protecting" her (T 1262).

So far as the record shows, it was at this time (May 15) that the Gray family was first in touch with Archie B. Weston, the lawyer representing Williams, Rainge, and Jimmerson. This came out when Mrs. Gray was testifying (called by the State) at a suppression hearing during the trial. Under cross-examination by Weston, Mrs. Gray testified that on May 15, evidently in the early evening, she did not know where Paula had been taken. Weston asked Mrs. Gray when she learned where Paula was staying; her reply was: "That's when I got in touch with you" (T 1191). Weston dropped the subject at once. The State then questioned Mrs. Gray about her call to Weston. She would not say whether she knew Weston but said she had "heard quite a bit about him", that somebody had given her Weston's phone number, but that she couldn't remember who did so (T 1194). She further testified that "Mr. Weston had made some phone calls and that's how we found out about Paula" (T 1195).

While the record does not make it certain, it seems reasonably clear that Weston was already on May 15 representing Williams, Rainge and Jimmerson as their attorney. Paula's mother on or before May 15 had been given Weston's phone number and was in touch with him. Weston had known what phone calls to make on May 15 to find out the motel where the State was keeping Paula.

It seems evident that if Mrs. Gray did not already know Weston by Monday evening, May 15, she had indeed "heard quite a bit about him". She had been at her apartment out of touch with the police, since Sunday morning, May 14. The relatives of Williams were close by and they were keenly interested in Paula, the only eyewitness to the crimes except for the males who as principals committed them. If anybody gave Mrs. Gray the phone

number of Weston, it must have been one of the relatives of Williams.

Police officers drove Mrs. Gray on the evening of May 15 to the Holiday Inn at Harvey and, after a visit with Paula, drove her home.

7.

On the next day, Tuesday, May 16, after breakfast, officers came to the Holiday Inn with Mrs. Gray who said: "Paula, just tell the truth" (T 1164). They all then went to the State's Attorney's offices and Paula testified in the same building before the grand jury.

Paula testified under oath to what she had already told the police and State's Attorneys several times. In summary, she testified that she was with Adams in a car parked near her apartment from the evening of May 10 to the early hours of May 11; that she left him and went to her apartment; that she heard noise and looked out; that she saw Williams' car; that she went to a vacant house next to hers; that she was trying to hide; that she saw Williams, Jimmerson, and Rainge and "two people" (the victims) in the back of Williams' car; that Williams saw her, came to her, took her by the hand, told her to come with him, to follow him; that she did follow him; that the "two people", a white man and woman, were made to go to 1528 Cannon Lane nearby, an abandoned apartment; that they took the woman upstairs; that Rainge stayed with the man; that Williams handed Paula a lighter and told her to light it and hold it; that she did so; that the three men already named plus Adams (who had reappeared) then raped the victim twice each (once for Adams); that Williams then shot the victim twice in the head; that Williams took Paula's hand and told them all to go downstairs; that Williams, Rainge, and she then went with the man near the creek, with Williams still holding Paula by the hand; that near the creek Williams shot the man twice in the head; that Rainge then shot him once in the back; that the three then walked to the creek and Williams threw the gun in the creek at the

point she had shown the police; and that Williams told her not to tell the police and that if she did, he would kill her and her family. Paula further testified that she had told what happened to her mother, to her twin sister, to police officers, and to the State's Attorneys.

8.

After her grand jury testimony, Paula and her mother talked with Johnson, a senior State's Attorney, in an office in the same building. They discussed where Paula should stay, whether she should return to the community or be put up and protected as a witness for the State. Mrs. Gray and Paula consulted together, Mrs. Gray saying "repeatedly" to Paula "whatever you want" (T 1267). Paula finally decided and "indicated she wanted to go to the motel again" (T 1267). Mrs. Gray testified that "I just told them to take Paula because I didn't want anything to happen to Paula" (T 1192). Arrangements were made for Paula to stay that night; May 16-17, at a different motel, the Holiday Inn at Hillside, and she did stay there. The next day, May 17, Paula said she wanted to go back to her family; the police officers took her to the Gray apartment, 1525 Hammond Lane, in the housing complex.

Now, on May 17, Paula was back in the community and away from the protection of the State. It was now possible that she could be influenced to deny the truth of the testimony she had given to the grand jury and to the police officers and to refuse to give any further testimony which would incriminate the male principals, all but one of whom were represented by Weston.

9.

It was now arranged for Paula and her family to move in with the Williamses in their home. The Williams family itself did the moving (T 2259). It is not possible from the record to establish exactly when the Gray family moved in with the family of Williams, but it was sometime after Paula testified to the grand jury on May 16 and before the preliminary hearing on June 19, 1978 for

the males accused. Paula admitted this as follows (T 2283):

> Q But it was sometime between the time that you went home from the Holiday Inn and when you came to the preliminary hearing with Mr. Weston, isn't that correct?
> A Yes.

According to the Appellate Court of Illinois in affirming the conviction of Paula, she and her family moved in with the Williams a "few days" after May 17 when she returned home from the Hillside Motel (408 N.E.2d at 1156).

It is evident from the record that Weston began to have contacts with Paula at about this time and that he was concerned with any further testimony by her concerning Williams, Rainge and Jimmerson. Exactly when Weston began to represent Paula as her attorney cannot be established from the record but the only reasonable conclusion is that Weston was advising her before the preliminary hearing on June 19.

10.

The State had arranged for Paula to testify as a witness for the State to show probable cause at the preliminary hearing on June 19 against Williams, Rainge, Adams, and Jimmerson. She came to the courtroom for the hearing with Weston, counsel to three of the accused, and had walked up the steps to the courtroom, hand in hand with Weston. When she testified for the State, she flatly contradicted what she had told to police officers and to the grand jury; she swore that she knew nothing about the crimes committed on May 11 and that she had been forced by the law enforcement officers to lie. Without Paula's supporting testimony, the charges as to Jimmerson were dismissed for want of probable cause and he was released. Even without her testimony, the charges were sustained as to Williams, Rainge, and Adams.

Paula left the court building with Weston.

On July 3, 1978, an information was filed against Williams, Rainge, and Adams charging them with the crimes committed by them as principals on May 11, 1978.

On September 1, 1978, an indictment was filed against Paula for the crimes committed by her as aider and abettor against the two victims on May 11, 1978, and for the perjury committed on June 19, 1978, at the preliminary hearing. As was to be expected, Weston, on the day the indictment was filed, entered his formal appearance as attorney for Paula.

It may be noted that, in acting as attorney for Paula, Weston could expect to receive no compensation from Paula or her family. The record shows that they were all indigent, without property, and receiving Public Aid. Were Weston in prosperous circumstances, it might be reasonable for him to undertake a public service. But as will later be seen, Weston was himself in deep financial distress at the time. The only reasonable conclusion is that Weston acted as attorney for Paula primarily, if not entirely, to prevent her testifying against Williams, Rainge, and Jimmerson who—unlike Paula—faced the death penalty. Whether Weston in fact was paid by Williams or the others for representing Paula, does not appear of record.

11.

The trial began on September 14, 1978, with Weston representing Williams, Rainge, and Paula; another lawyer represented Adams. At the suggestion of the State, the trial was before two separate juries in the same courtroom, one jury for the charges against Paula, the other jury for the charges against Williams, Rainge, and Adams. Some evidence was heard by the jury for Paula, some by the other jury, and some by both juries. This method was designed, among other things, to avoid the problem that the incriminating testimony of Paula to the grand jury and her incriminating statements to others, while ad-

missible against her, were not admissible against the male defendants (*Bruton* v. *United States*, 391 U.S. 123 (1968)).

On September 29, during the presentation of the State's case, a motion was filed by Weston on Paula's behalf to suppress as evidence all statements, admissions, etc., of Paula, including her grand jury testimony on May 16. There were several grounds recited for the motion, such as failure to give *Miranda* warnings, coercion, etc. The motion falsely claimed that she was arrested on May 13. According to the arrest card in the record and all the other evidence, she was arrested on August 31, 1978.

The motion to suppress was heard, without the jury, on October 4. As indicative of the testimony Paula gave about police coercion of her to lie to the grand jury, the following may be noted (T 1025-26, emphasis supplied):

> Q And, Paula, down there at the Grand Jury how was it that they made you lie to the Grand Jury? What did they do to you and who did it?
> A Look, they forced me to tell a lie.
> Q Who did?
> A I know what I'm talking about. P.J. and all the rest of them and him too.
> Q P.J. wasn't in that Grand Jury room with you, was he?
> A They were standing outside of the Grand Jury.
> Q How did he make you tell a lie that day down at the Grand Jury?
>
> [Colloquy and objection overruled]
>
> MR. ARTHUR: Would you repeat the question.
>
> (Record read by reporter)
>
> THE WITNESS: *They was trying to be nice to me and everything and all that.* I don't take no niceness from no cops because I don't like them.

At the conclusion of the hearing, the motion to suppress was denied from the Bench. The trial judge found, among

other things, that Paula was "adequately and properly advised and warned" under the *Miranda* ruling; that Paula was "not under arrest"; that "no force was exercised, no promises; no threats, no harm was done"; and that she made her statements, including her testimony to the grand jury, "voluntarily" (T 1311-14).

The trial resumed. The State completed its case in chief on October 16 (T 2136). The State then dismissed ten counts against Paula, leaving against her five counts charging murder, one count charging rape, and one count charging perjury.

The defense for Paula Gray was presented on October 18. An investigative officer, called by Adams, testified apparently before both juries. Then Paula testified before the jury in her case. After her testimony, Weston rested her case (T 2308).

The State called a rebuttal witness on October 19 and rested its case. There were no further defense witnesses.

Summations and the instructions of the Court were given on October 20. The jury returned, on the same day, written verdicts of guilty against Paula Gray on the seven counts of murder, rape, and perjury.

Sentence was imposed on Paula on January 22, 1979. The sentence was 50 years imprisonment for the murders and for rape and 10 years for the perjury, all sentences to run concurrently. The trial judge found that the perjury was aggravated by a false claim that her original and truthful account of what happened was a lie forced on her by the law enforcement officers.

At the sentencing of Paula, Weston represented that she was indigent and provided a statement showing financial destitution. The Court appointed the Public Defender to perfect her appeal.

12.

At the close of the trial, the jury hearing the case against Williams, Rainge and Adams returned written verdicts of guilty on all counts submitted.

The State advised the Court that it would ask the death penalty on the murder counts against the three convicted male defendants.

Adams waived a jury for the separate sentencing proceeding. Ill. Rev. Stat., ch. 38, § 9-1(d)(3). Very long prison terms were imposed on Adams.

Williams and Rainge asked for a jury for the death sentence proceedings and that the jury be different from that at the trial. Ill. Rev. Stat., ch. 38, § 9-1(d).

The sentencing jury agreed unanimously that there were no mitigating factors to preclude the death penalty for Williams and Rainge and unanimously concluded that Williams should be sentenced to death. The jury could not agree unanimously on the death penalty for Rainge. The Court sentenced Rainge to life imprisonment for murder and to long prison terms on the other counts.

13.

On August 8, 1980, the Appellate Court of Illinois, First District, Fifth Division, affirmed the convictions and sentences of Paula. 408 N.E.2d 1150.

Appointed counsel, replacing Weston, argued on appeal that if Paula's statements and grand jury testimony are assumed to be truthful, whatever she did was forced by Williams and that, without any request, an instruction should have been given on the affirmative defense of compulsion. The Court found that there was not sufficient evidence presented for Paula to support the defense of compulsion or to justify an instruction on the subject.

Appointed counsel also argued that there was a violation of Paula's constitutional right to conflict-free counsel because Weston had an actual conflict of interest in

representing Paula and also Williams and Rainge. The Court found that this argument required an assumption that Paula's "grand jury testimony was the truth and was known to be so by attorney Weston". 408 N.E.2d at 1157 The Court refused to make the assumption and found that there was "no proof of actual conflict". 408 N.E.2d at 1157 It may be noted that the conviction of Paula of perjury had established that her grand jury testimony was the truth.

On December 2, 1980, leave to appeal was denied by the Supreme Court of Illinois. 81 Ill.2d 604.

On March 30, 1981, *certiorari* was denied by the Supreme Court of the United States. 450 U.S. 1032.

On August 11, 1981, with the Public Defender continuing as her counsel, the petition of Paula for a writ of habeas corpus—the petition now before us—was filed in the District Court.

14.

Williams prosecuted a direct appeal to the Supreme Court of Illinois, to which he was entitled as of right because he was under sentence of death. Ill. Const. art. VI, § 4. The Public Defender had been appointed to represent him.

On April 16, 1982, the Supreme Court of Illinois filed an opinion and decision affirming the judgment of conviction and sentence of death imposed on Williams. One justice dissented from the affirmation of the death sentence and one justice dissented from the affirmation of conviction. For reasons which will appear, this opinion was never published, but we have been furnished a copy by the Clerk of the Court.

One of the arguments made for Williams was that he did not have effective assistance of counsel and that the loyalty of Weston was divided by a conflict of interest between Williams and Paula. The Court rejected this argument on the ground that, after she changed her grand

jury testimony at the preliminary hearing, any conflict which might have existed "disappeared" and that after the preliminary hearing the positions taken by Williams and Paula were "totally consistent". The Court pointed out a possible benefit to Williams from the dual representation by Weston of Paula, in that "had Gray been represented by other counsel, she might well have defended on grounds of coercion and become a witness against Williams".

On May 7, 1982, Williams filed a petition for a rehearing.

15.

While the petition of Williams for a rehearing was pending before the Supreme Court of Illinois, oral argument took place before that Court in a disbarment proceeding against Weston. The proceeding involved misconduct by Weston in the handling of the estate of a client, including conversion of funds. There had been a judgment against Weston and apparently a sheriff's sale of his home.

The information in the disbarment proceeding was new to the Supreme Court of Illinois, which caused the record to be sent to counsel on the Williams appeal and invited suggestions whether the disbarment proceedings were relevant to the Williams appeal. Thereafter, the Court granted the Williams petition for a rehearing.

16.

On June 7, 1982, the Appellate Court of Illinois, First District, First Division, filed an opinion affirming the convictions of Rainge and Adams. This opinion was later "revised" and it was never published as filed. We have not been able to obtain a copy of the opinion from the Clark of the Court.

Rainge and Adams moved for a rehearing on their appeals, the disposition of which was contained in the June 7, 1982 opinion.

17.

On May 6, 1982, the District Court, as earlier noted, had denied the motion of the respondent custodian to dismiss the petition of Paula for a writ of habeas corpus.

On October 18, 1982, the District Court granted the motion of the respondent custodian and dismissed the petition of Paula for a writ of habeas corpus, thus changing the earlier decision.

18.

On October 22, 1982, the Supreme Court of Illinois filed an opinion in the disbarment proceeding against Weston; it found the charges of misconduct amply proved. A last-ditch motion by Weston to strike his name from the roll of attorneys was denied, primarily because of the "serious nature of the unprofessional conduct involved". The Supreme Court ordered Weston disbarred. 442 N.E.2d 236.

19.

On November 18, 1982, the Supreme Court of Illinois filed a second opinion on the appeal by Williams. 444 N.E.2d 136. The Court continued to find the evidence sufficient to prove Williams guilty beyond a reasonable doubt. But the Court did not affirm the conviction; instead the Court reversed and remanded to the Circuit Court for a new trial. The Court first explained:

> [F]undamental fairness requires us to examine the additional information now before us concerning counsel's misconduct and the events occurring during the same period that he represented three defendants in a capital case to determine whether it has any bearing on the quality of that representation. 444 N.E.2d at 138.

After the examination indicated, the Court found that:

> [B]ecause of the newly acquired information concerning Williams' counsel, which we have concluded may well have had an effect on counsel's ability to represent his client in the trial of this capital case, we can no longer say, with any degree of assurance, that Williams received the effective assistance of counsel guaranteed by the Constitution. 444 N.E.2d at 142.

The Court concluded:

> We believe, however, considering the unique circumstances and sequence of events in this capital case, which will rarely, if ever, be duplicated, that the interests of justice require that Dennis Williams be granted a new trial. 444 N.E.2d at 143.

20.

On the same day, November 18, 1982, on which the Supreme Court of Illinois filed its opinion reversing the conviction of Williams, counsel for Paula filed a motion, on the basis of the decision as to Williams, for leave to file a motion for a supervisory order granting Paula a new trial or alternatively to reconsider Paula's petition for leave to appeal to the Supreme Court of Illinois.

On November 24, 1982, the Supreme Court of Illinois denied Paula's motion "without prejudice to petitioner to file a petition for post-conviction relief in the trial court".

21.

On February 22, 1983, on the appeals of Rainge and Adams, the Appellate Court of Illinois, First District, First Division, filed "the revised opinion of the court upon consideration of defendants' petition for rehearing". 445 N.E.2d 535, 537. The decision was different from that in the opinion filed June 7, 1982. The judgments of conviction of Rainge were vacated and the cause remanded for

a new trial. The judgments of conviction of Adams were affirmed.

As to Adams, he could not rely on the argument of ineffective assistance of counsel or conflict of interest from multiple representation. It was this argument that had persuaded the Supreme Court of Illinois to order a new trial for Williams; but Adams had separate counsel who represented Adams alone.

As to Rainge, however, the situation was substantially the same as that of Williams. Weston had represented them both. The Court concluded that the decision of the Supreme Court of Illinois in its second opinion concerning Williams (*"Williams II"*) mandated a new trial for Rainge as well. The Court stated its conclusion (445 N.E. 2d at 547):

> We are of the opinion that the similar interests of Williams and Rainge and the similar issue raised on the same record require that defendant Rainge be granted a new trial. As in *Williams II*, we base our decision upon "the unique circumstances and sequence of events in this capital case which will rarely, if ever, be duplicated."

22.

We have recounted the history of the prosecutions in some detail so as to explain how the present state of affairs has come about. Five persons are shown by the evidence to have done the rape and killing on May 11, 1978. After the passage of more than five years, the conviction of only one of these (Adams) appears final; one (Jimmerson) has escaped even a trial; two (Williams and Rainge) must be retried; and the fifth—the least culpable, except for her perjury—is the appellant now before us.

23.

The record establishes that an actual conflict of interest existed between appellant Paula and her co-defendant

Dennis Williams (for simplicity we limit our discussion to Williams) and that they were both represented by the same attorney. This was a violation of Paula's constitutional right to the assistance of counsel and entitles her to a new trial. "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest". *Wood* v. *Georgia,* 450 U.S. 261, 271 (1981).

While Paula was not indicted until September 1, 1978, the record leads us to conclude that Weston was advising Paula from a time after her grand jury testimony on May 16, 1978, and *before* her appearance with Weston, although to be a state's witness, at the preliminary hearing on June 19, 1978. It is not significant on this appeal as a matter of law whether Weston acted as attorney for Paula before her indictment and trial, but is is significant as a matter of fact because it shows the genesis of Weston's involvement with Paula and the results of that involvement.

Between May 13 and May 17, 1978, while she was in close touch with the police officers, kept by them at a motel for two nights and advised by her mother and twin sister to cooperate and tell the truth, Paula, as an eyewitness, made a number of statements and gave sworn testimony to a grand jury, seriously implicating Williams in the May 11, 1978, crimes, and implicating herself in the same crimes.

When she left police protection and returned to the community on May 17, 1978, Paula was a 17 year old, mentally retarded girl, in school classes for EMH (educable mentally handicapped) children, herself and family indigent, without any criminal record, and, as (at most) an aider and abettor, much less seriously implicated in the crimes than Williams, a principal. By reason of her age, Paula was not subject to the death penalty. Moreover, on her statements and testimony to the grand jury, she had the defense of coercion by Williams to do whatever

she did and, if this defense did not prevail, it could have been urged for her that whatever she did was not sufficient to constitute her an aider and abettor.

An independent, conflict-free, competent attorney for Paula would at this point have carefully considered continued cooperation with the State as a means of avoiding any prosecution of her; or an immunity agreement with the State; or a plea bargain with the State; or in the event prosecution and trial were necessary, a strong defense of coercion by Williams; or, in the event of conviction, a strong plea for leniency based on minimum participation. Weston could not, and did not, adopt any of these options because each of them would have put his client Williams in jeopardy. "A conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." *Foxworth* v. *Wainwright,* 516 F.2d 1072, 1076 (5th Cir. 1975).

The interests of Williams, however, were completely different from those of Paula. Williams was over 21, male, had a criminal record which included guilty pleas in 1976 to two felonies (theft and arson), and was deeply implicated in the crimes, there being an eyewitness (other than Paula) who could (and did) identify Williams as one of those active in the area when the crimes were committed and where the bodies were found. The same witness could (and did) identify the automobile of Williams as one of those in the area of the crimes when they were committed. Williams was subject to the death penalty.

The interests of Williams were to prevent Paula from continuing to cooperate with the State, to influence her to recant her grand jury testimony against him, and to influence her to forego any defense of coercion by Williams.

The interests of Williams were successfully advanced by his family and his attorney. Soon after May 17 Paula and

her family moved in with the family of Williams, and Weston, already in contact with Paula's family, undoubtedly began advising her. So it was that on June 19 at the preliminary hearing, Paula—although a witness for the State—appeared with Weston and changed entirely her grand jury testimony. She denied that she knew anything about the May 11 crimes.

As a result of her change at the preliminary hearing, Paula was then indicted, Weston appeared formally for her, and the trial followed with Weston representing Paula, as well as Williams and Rainge.

We believe that the actual conflict between Paula and Williams clearly appears on the face of the record.

The Appellate Court of Illinois, in affirming Paula's conviction, rejected any argument that there was a conflict of interest between Paula and Williams, primarily for the reason, mistaken we believe, that their defenses at trial did not conflict (408 N.E.2d at 1157) because both denied having had anything to do with the crimes. The test for conflict between defendants is not whether the defenses actually chosen by them are consistent but whether in *making the choice* of defenses the interests of the defendants were in conflict. As expressed in a discussion of this point by the Fifth Circuit: "[T]he conflict occurred not in presenting the defense chosen by appointed counsel, but in selecting defenses and strategies in the first place." *Foxworth* v. *Wainwright, supra,* at 1079.

The Appellate Court also felt that to find Weston disqualified, it had to be assumed that Paula's grand jury testimony was true and that Weston knew it. We believe this reasoning also was mistaken. Weston's disqualification did not depend on the truth of Paula's grand jury testimony but on whether Weston could make an *independent* conflict-free judgment on that and other points. As long as Weston represented Williams he was not conflict-free and could not make an independent judgment. This appears to have been recognized by the Supreme

Court of Illinois in its unpublished opinion filed April 16, 1982, when, in dealing with Williams' argument based on the representation by Weston of him and Paula, the Court said:

> ". . . had Gray been represented by other counsel she might well have defended on grounds of coercion and become a witness against Williams."

If, because he was represented by Archie Weston, "the interests of justice require that Dennis Williams be granted a new trial", as ruled by the Supreme Court of Illinois (444 N.E.2d at 443), and if Rainge has been granted a new trial, as ruled by the Appellate Court of Illinois (445 N.E.2d 535), we are satisfied that Paula Gray, represented to her prejudice by the same Weston, should also be given a new trial.

24.

The District Court did not reach the merits of the matter, ruling that Paula has not exhausted available state remedies under post-conviction relief procedure. Ill. Rev. Stat. ch. 38, §§122-1 and following.

The District Court recognized that claims which were raised (as was the conflict of interest claim) on direct appeal will not be reviewed in post-conviction proceedings in Illinois unless they are based on matters outside the record.

The District Court recognized that the petition and supporting memorandum do not rely on matters outside the trial record. The memorandum for petitioner asserts that the conflicting interests of Paula and Williams were "plain upon the trial record".

Nevertheless, the District Court held that the petition raised unexhausted claims because (1) suggestions of improprieties "truly deserve a hearing"; (2) there should be a hearing in which counsel can defend himself against

serious charges; and (3) the state courts should be given the first chance to conduct such a hearing.

We believe that under the circumstances here present—especially the grant of new trials by the Illinois Courts to Williams and Rainge *after* the decision of the District Court in the case at bar—these reasons are not sufficient to require Paula to attempt to secure post-conviction relief in the Illinois courts. In making this determination, we have in mind the considerable lapse of time since the crimes were committed and since the date of the conviction. The interests of justice will be better served if the new trial can be conducted with reasonable promptness.

The order of the District Court is reversed and the cause remanded to that Court with directions to issue an order to respondent to release Paula Gray unless the State elects to retry her within such reasonable time as may be fixed by the District Court.

APPENDIX B

Order of the United States Court of Appeals for the Seventh Circuit Denying a Rehearing.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 22, 1983

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. INZER B. WYATT, Senior District Judge*

No. 82-2940

UNITED STATES OF AMERICA ex rel.
PAULA GRAY,

Petitioner-Appellant,

vs.

DIRECTOR, DEPARTMENT OF CORRECTIONS,
STATE OF ILLINOIS,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 81 C 4545

SUSAN GETZENDANNER, *Judge*.

---

* The Honorable Inzer B. Wyatt, Senior District Judge for the Southern District of New York, is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the respondent-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

No. 83-1286

In the

Supreme Court of the United States

OCTOBER TERM, 1983

DIRECTOR, Illinois Department of Corrections,
Petitioner,

vs.

PAULA GRAY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX GIVING THE OPINION OF THE DISTRICT COURT

NEIL F. HARTIGAN
Attorney General,
State of Illinois,
188 West Randolph Street,
Suite 2200,
Chicago, Illinois 60601,
Attorney for Petitioner.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
500 Richard J. Daley Center,
Chicago, Illinois 60602,

MICHAEL E. SHABAT,*
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.
* Counsel of Record
(312) 443-5496

The Scheffer Press, Inc.—(312) 263-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1286

DIRECTOR, Illinois Department of Corrections,
Petitioner,

vs.

PAULA GRAY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX GIVING THE OPINION OF THE DISTRICT COURT

The following is the opinion in the above-entitled action of the United States District Court for the Northern District of Illinois. *United States ex rel. Paula Gray* v. *Director, Department of Corrections, State of Illinois* (No. 81 C 4545, September 30, 1982). The opinion is unpublished. The decision of the District Court was subsequently reversed by the United States Court of Appeals for the Seventh Circuit. *United States ex rel. Paula Gray* v. *Director, Department of Corrections, State of Illinois,* 731 F. 2d 586 (7th Cir. 1983). The opinion of the Court of Appeals is given in Appendix A of the Petition for a Writ of Certiorari.

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 81 C 4545

UNITED STATES OF AMERICA, ex rel. PAULA GRAY,

Petitioner,

vs.

DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, STATE OF ILLINOIS,

Respondent.

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, *District Judge*:

This petition under 28 U.S.C. §2254 presents a difficult question regarding exhaustion of state remedies. For the reasons stated below the court grants respondent's motion to dismiss.

Petitioner Paula Gray was convicted in 1979 of murder, rape and perjury. According to the state's evidence, Gray and four male companions abducted Carol Schmal and Lawrence Lionberg from the gas station where Lionberg worked the night shift and took them to an empty house in East Chicago Heights, Illinois. Schmal was taken upstairs, raped several times, and then executed by two close-range gunshots into the back of her head. Lionberg was taken into a field and shot to death. Gray was shown to have held a cigarette lighter to provide enough light for her companions to have intercourse with Schmal.

A few days later Gray testified to the foregoing facts before a Cook County Grand Jury. Still unindicted, she testified at a pre-trial hearing for her companions, but at this hearing she recanted, stating that her Grand Jury testimony had been the product of coercion. Gray herself shortly was indicted for her role in the crime, and she was charged with perjury as well. Tried simultaneously with two of her companions, but before a separate jury, Gray was convicted and sentenced to two 50-year and one 10-year sentences, all to run concurrently.

Some time after she recanted her Grand Jury testimony, Gray began to be represented by the same attorney who represented her companions; he continued to represent her through trial. Gray's petition to this court contends that this multiple representation denied her effective assistance of counsel under the Sixth and Fourteenth Amendments.

Gray advances two theories as to how her right to effective counsel was denied. First, Gray argues that under the circumstances of her case the trial court was required to inquire, sua sponte, into the adequacy of the multiple representation. Gray relies on *Wood* v. *Georgia*, 101 S. Ct. 1097 (1981), and *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), for the proposition that "special circumstances" can impose such a requirement on a trial court. As special circumstances, Gray points to several comments made at trial, mostly at the hearing of her pretrial motion to suppress her Grand Jury testimony. Most important were statements that Gray previously had complained of death threats from one of her companions, represented by the same counsel, and statements indicating that counsel may actively have sought

to represent Gray. It also was stated to the trial court that Gray had an I.Q. in the range of 65. Gray argues that these statements, all made on the record, should have alerted the trial court to the possibility that Gray could not receive adequate representation. Gray does not ask the court to find, based on the record, that threats and other improprieties actually took place.[1]

Gray's second theory is simply that she in fact was denied effective assistance of counsel because an actual conflict is apparent from the record. Gray argues that the record shows clearly that her counsel was foreclosed from advising her to testify against her companions in return for leniency. For this argument Gray disclaims reliance on any off-record occurrence.[2]

State prisoners petitioning for habeas corpus relief under 28 U.S.C. §2254 are required first to exhaust all available state court remedies. 28 U.S.C. §2254(b), (c); *Rose* v. *Lundy,* 102 S.Ct. 1198 (1982). Although the issue of ineffective assistance of counsel was not raised at Gray's trial, she did raise this issue on direct appeal, represented by new counsel. Gray's conviction was affirmed, and she was denied leave to appeal to the Illinois Supreme Court. The United States Supreme Court denied Gray's petition for certiorari. Gray has

---

[1] At the hearing on Gray's motion to suppress, James Houlihan, a homicide investigator with the Cook County Sheriff's Police, testified that Gray had said she was afraid of Dennis Williams, one of her companions. Gray herself was asked twice whether she had made such a statement, and she denied it both times.

[2] Arguably, prevailing on her first theory alone, without demonstrating an actual conflict, would not entitle Gray to relief. *See Wood* v. *Georgia,* 101 S.Ct. at 1104 n.21. The court does not decide this question.

not sought relief under Illinois' post-conviction relief procedure, Ill. Rev. Stat. 1979 Ch. 38, §122-1 *et seq.* Respondent moves to dismiss on the basis that Gray has not exhausted her state remedies.

Proper analysis of exhaustion questions must always begin with the basic proposition stated in the federal statute: state prisoners must utilize available, effective state procedures to raise questions about the legality of their conviction and imprisonment. 28 U.S.C. §2254(b), (c). Illinois courts apply the doctrines of *res judicata* and waiver to bar post-conviction review of claims that were raised or that could have been raised on direct appeal, and the state procedure thus has been held not to constitute an effective remedy where these doctrines will be invoked to bar the claim. *United States ex rel. Barksdale* v. *Sielaff*, 585 F.2d 288 (7th Cir. 1978), *cert. denied*, 441 U.S. 962 (1979). Direct appeal involves review of record proceedings only, so the doctrines of *res judicata* and waiver do not bar post-conviction review of claims based on matters outside the record. *People* v. *Stepheny*, 46 Ill. 2d 153, 263 N.E. 2d 83 (1970). Since state post-conviction review is available for claims based on matters outside the record, federal petitions raising matters off the record will be dismissed unless the petition has utilized the state procedure. *United States ex rel. Williams* v. *Israel*, 556 F.2d 865 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975). The briefs in this case therefore have discussed the question whether Gray's petition does or does not raise claims based on matters outside the record; on this turns the question whether Gray has exhausted her state remedies.

Taken at face value, Gray's petition and memoranda do not raise claims based on matters outside the record.

In fact, they are very skillfully tailored to rely wholly on record matters. Gray's first theory asserts that the trial court should have conducted an inquiry, based on what it knew from record proceedings. This theory relies on *references* in the record to off-record events, such as threats against Gray's life, but the theory rests only on these references; it is irrelevant, taking the argument on its own terms, whether the death threats referred to actually took place. Gray's second theory expressly disclaims reliance on any off-record matters. The court is invited to look only at the trial record to determine that an actual conflict inhered in the multiple representation undertaken by Gray's counsel.

Ordinarily courts decide cases as they are presented by the parties and their counsel. Courts do not usually concern themselves with what additional claims a petitioner might have raised. *Rose* v. *Lundy* expressly contemplates that petitioners may cure defects in their petitions by omitting unexhausted claims; the court reviewing the cured petition should not be concerned with these omitted claims. 102 S. Ct. at 1204, *see also id.* at 1210-11 (Brennan, J., concurring in part and dissenting in part). In this case, however, Gray has framed her petition in a very awkward way, and the court must hold that it raises unexhausted claims, even though Gray purports not to be raising those claims.

Gray's first theory, as noted above, asserts that certain on-record references to off-record events should have alerted the trial court to the need for an inquiry. In support of this argument Gray offers broad speculations as to the scenario which these on-record references should have suggested to the trial court. This scenario

generally includes that Gray was willing to testify against her companions, but that they threatened her and her family; that she recanted her testimony under these threats; that her companions' attorney somehow succeeded in having Gray and her mother retain him to defend Gray; and that the attorney thereafter made certain that Gray would not testify against his other clients, even if Gray could have obtained some kind of leniency by doing so. Because such a scenario was suggested by on-record comments—which are insufficient to *prove* such a scenario—the trial court, in Gray's view, should have inquired into the matter.

Gray's second theory asserts an actual conflict in the multiple representation. In its consideration of this theory the court is invited to consider only that which fairly appears from the record; that is, the court is asked to consider whether there was an actual conflict without investigating the possibility, asserted elsewhere and only suggested on the record, that one joint client threatened the life of another.

There are several reasons why this court should view Gray's petition as raising unexhausted claims. Such serious allegations of off-record improprieties truly deserve a hearing; a full consideration of Gray's claim really cannot be made based on the record alone. Further, a writ cannot issue from this court without a hearing in which counsel can defend himself against these most serious charges. *United States ex rel. Cosey* v. *Wolf*, 682 F.2d 691 (7th Cir. 1982). If a hearing is to be held, the state courts should be given the first opportunity to investigate these alleged infirmities in a state prosecution. This, of course, is a central goal of the federal exhaustion requirement. *Rose* v. *Lundy*, 102

S. Ct. at 1023. It should be stressed that the general rule is that total exhaustion of state remedies is required. The statute recognizes that ineffective remedies need not be pursued, but the court need not honor every attempt to bring a petition within this exception.[3]

It is important to say a word about *Wood* v. *Georgia*, 101 S. Ct. 1097, relied on by Gray and arguably the governing precedent for Gray's first theory, that the trial court should have inquired, sua sponte, into the multiple representation. In that case Wood and others were convicted and placed on probation while represented by counsel retained by their employer. When they could not pay the fine which was a condition of their probation, their probation was revoked. On a writ of certiorari the Supreme Court reviewed the affirmance of this revocation by the Georgia Court of Appeals. Holding that the trial court should have been alerted by special circumstances to the need for an inquiry into the counsel's effectiveness and loyalty, the Court returned the case to the trial court for such an inquiry. The application of *Wood* to a habeas petition, rather than to direct appellate review, is not clear. *See* 101 S. Ct. 1104 n.21. In any event, since the relief granted in *Wood*, Gray's own authority, was an order directing a hearing by the state trial court, it does not seem too harsh for this court to ask Gray to seek a hearing in the state courts. If relief is denied, then Gray's petition will stand

---

[3] The statutory test is whether state procedures are ineffective to protect the rights of the prisoner; it is not whether the petition as actually framed and presented to the federal court could be considered in state proceedings.

in a different position with respect to federal exhaustion requirements. The court therefore grants respondent's motion to dismiss.

It is so ordered.

/s/ Susan Getzendanner
United States District Judge

Dated: September 30, 1982

No. 83-1286

In the
Supreme Court of the United States
October Term, 1983

DIRECTOR, Illinois Department of Corrections,
Petitioner,

vs.

PAULA GRAY,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

James H. Reddy
Assistant Public Defender
403 Daley Center
Chicago, Illinois 60602
(312) 443-6350
Attorney for Respondent.

The Schaffer Press, Inc.—(312) 263-6250

QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals abused its discretion in deciding the merits of Respondent's constitutional claim where the Court had before it (1) the state trial record upon which the claim was solely based; (2) the state appellate court briefs of the parties on the merits of the constitutional claim (including the Petitioner's 82-page brief); (3) the opinion of the state appellate court which specifically rejected the constitutional claim; and (4) the federal district court pleadings and memoranda of law of the parties seeking summary judgment on the constitutional claim.

Whether Respondent exhausted her state remedies where she had previously raised the federal constitutional claim in the state appellate court; where the state appellate court specifically ruled on the merits of the claim; where she then presented the constitutional claim to the state supreme court in a petition for discretionary review; and where she was therefore precluded from seeking state collateral review by state doctrines of waiver and res judicata.

Whether the Court of Appeals correctly decided that Respondent's Sixth Amendment right to conflict-free counsel was violated at her state court trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-1286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DIRECTOR, Illinois Department of Corrections,

Petitioner,

vs.

PAULA GRAY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This Court is referred to the statement of facts contained in the Seventh Circuit Court of Appeals opinion in this case. See United States ex rel. Gray v. Director, 721 F.2d 586 (7th Cir. 198 which opinion is reprinted as Appendix A to the Petition for Writ Certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DECIDING THE MERITS OF THE CONSTITUTIONAL CLAIM.

This Court, in Singleton v. Wulff, 428 U.S. 106 (1976), note

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. 428 U.S. at 121.

Clearly, the Court of Appeals did not abuse its discretion in reaching the merits of Respondent's constitutional claim. It is not uncommon for the Court of Appeals to reach the merits of a state habeas petition that it finds improperly dismissed. Cf. Williams v. Kullman, 722 F.2d 1048, 1049 (2nd Cir. 1983). The reason is obvious: remand to the district court for a decision on the merits of a question of constitutional law would inevitably be followed by appeal back to the Court of Appeals by the losing party. At such a second appeal, the Court of Appeals would undertake de novo review of the constitutional question. United States v. Cockrell, 720 F.2d 1423, 1426 (5th Cir. 1983). Obvious considerations of efficiency and finality militated in favor of the Court of Appeals reaching the merits of Respondent's constitutional claim.

Petitioner claims that he was "unheard" in the court below and was unable to brief the merits of the constitutional claim. This is absurd. Petitioner filed an 82-page brief in the state appellate court over 4 years ago arguing that the trial record did not reveal "an actual conflict of interest manifested at trial." (Petitioner's state appellate court brief, 70, 71) The state appellate court ruled in favor of Petitioner and found no "actual conflict," citing this Court's decision in Cuyler v. Sullivan, 446 U.S. 335 (1980). People v. Gray, 87 Ill.App.3d 142, 408 N.E.2d 1150, 1157 (1980). After Respondent was denied discretionary review in the state supreme court (81 Ill.2d 604 [1980]), she sought a writ of certiorari in this Court, arguing that the state appellate court had misapplied Cuyler v. Sullivan. Petitioner opposed certiorari, arguing that Cuyler was properly applied. Certiorari was denied. Gray v. Illinois, 450 U.S. 1032 (1981).

Respondent then sought a writ of habeas corpus in the federal district court. She filed a 7-page petition/memorandum that solely relied on this Court's decisions in Wood v. Georgia, 450 U.S. 261 (1981),

Cuyler v. Sullivan, 446 U.S. 335 (1980), and Holloway v. Arkansas, 435 U.S. 475 (1978). Petitioner answered with a 13-page response. He also filed the 5-volume state trial record and the briefs of the parties in the state appellate court in support of his position that the trial record did not support a Cuyler claim. Noting that "there is no genuine issue as to any material fact," Petitioner sought summary judgment. Respondent agreed that there was no factual dispute but suggested that judgment be entered in her favor.

While the parties awaited a ruling on the merits of the Cuyler claim in the federal district court, this Court issued its opinion in Rose v. Lundy, 455 U.S. 509 (1982). The federal district court then ordered Petitioner to file a memorandum discussing the applicability of Rose v. Lundy to the case. Petitioner told the district court that "the instant petition presents but a single unexhausted claim." He concluded that Rose v. Lundy "has no special applicability to the resolution of the instant petition." (Memorandum filed March 30, 1982.) Yet on September 30, 1982, the district court issued an opinion dismissing the petition on Rose v. Lundy grounds.

Respondent appealed to the Seventh Circuit and attached a copy of the petition/memorandum for habeas corpus as an appendix to the brief. Although Respondent specifically addressed the district court's erroneous dismissal on Rose v. Lundy grounds, the Court of Appeals had before it the 5-volume trial record, the briefs of the parties in the state appellate court, and the pleadings and memoranda filed in the federal district court. In short, the Court of Appeals had before it every case and every argument that Petitioner had made on the Cuyler claim in 4 years of litigating that claim. Yet Petitioner was unheard? Petitioner could not reasonably write any more pages in support of its position on the Cuyler claim than were already before the Court of Appeals.

The Court of Appeals weighed Petitioner's arguments and found them wanting. Petitioner would have been quite willing for the Court of Appeals to reach the merits of the Cuyler claim if that court had ruled in his favor:

> Perhaps it would not have mattered that the Court of Appeals decided an issue . . . if that court had correctly stated and applied the law. (Pet. for Cert., 8)

But long ago Chief Justice Taft made clear that a petitioner's displeasure with the result below is no basis for this Court to exercise its sound discretion in granting the writ of certiorari:

> The jurisdiction [of this Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Magnum v. Coty, 262 U.S. 159, 163 (1923).

Petitioner has injected a few red herrings that should be summarily disposed of. Although Petitioner claims that the Court of Appeals misread Illinois law on coercion/compulsion, this is not true. The Court of Appeals simply quoted the Supreme Court of Illinois which noted (in the unpublished opinion in Williams I) that had Paula Gray "been represented by other counsel, she might well have defended on grounds of coercion and become a witness against Williams." Thus, the Supreme Court of Illinois--in ruling on a co-defendant's case--could not help but see that Paula Gray could not properly be represented by the same attorney who represented Dennis Williams. While it is true that compulsion is not a defense to murder in Illinois, it is a defense to rape and would have been available to Respondent at trial. Moreover, coercion would be extremely relevant on the issue of accountability, another defense ignored by Paula's conflict-laden attorney.

Another red herring is the fact of pending certiorari petitions in Illinois v. Williams and Illinois v. Rainge. The issue in those cases was ineffective assistance of counsel based on incompetence. The issue in Respondent's case was never incompetence of counsel but rather conflict of interest under Cuyler. Whether Williams and Rainge were

affirmed on appeal or not has nothing to do with the issue of conflict of interest, which the Illinois Supreme Court specifically held did not apply to Williams in Williams I.

II.

RESPONDENT HAD EXHAUSTED HER STATE REMEDIES.

Respondent argued in the state appellate court that the trial record demonstrated that Respondent's attorney labored under an actual conflict of interest. The state appellate court specifically ruled on this contention:

> Defendant next contends that her sixth amendment right to conflict-free counsel was violated. She argues that her representation at trial by attorney Weston (who was also counsel for Williams and Rainge), was an unconstitutional conflict of interest since she had initially been a State's witness against Williams and Rainge. We disagree. People v. Gray, 408 N.E.2d at 1156.

Respondent then filed a petition for discretionary review in the state supreme court, specifically arguing that the state appellate decision misapplied Cuyler v. Sullivan; arguing that Respondent had shown an actual conflict manifested in the record of her state trial. The petition was denied. People v. Gray, 81 Ill.2d 604 (1980).

Having raised the Cuyler claim in the state appellate court and state supreme court, Respondent was barred by the doctrine of res judicata from raising this same Cuyler claim in a state collateral attack. This was recognized by the Court of Appeals:

> The District Court recognized that claims which were raised (as was the conflict of interest claim) on direct appeal will not be reviewed in post-conviction proceedings in Illinois unless they are based on matters outside the record.
>
> The District Court recognized that the petition and supporting memorandum do not rely on matters outside the trial record. The memorandum for petitioner asserts that the conflicting interests of Paula and Williams were "plain upon the trial record." 721 F.2d at 598. (24a.)

The Court of Appeals, after reading the state trial record, agreed with Respondent:

> We believe that the actual conflict between Paula and Williams clearly appears on the face of the record. 721 F.2d at 597. (23a)

The Court of Appeals hardly waived the exhaustion requirement, as asserted by Petitioner. Rather, the Court of Appeals quite properly found that Respondent had in fact exhausted her state remedies.

III.

THE COURT OF APPEALS CORRECTLY APPLIED THE LAW OF CUYLER V. SULLIVAN TO THE FACTS OF THE CASE.

Since the reasons why Respondent is entitled to relief have already been well-stated by the Court of Appeals, Respondent will not further burden this Court by repeating them here. Suffice it to say that Petitioner's contentions are fully dealt with and rejected in the opinion of the Court of Appeals. Petitioner's proclivity for misreading that opinion is obvious:

> But the Court of Appeals here found evidence of an actual conflict to be unnecessary, since it voided respondent's conviction outright without remanding for an evidentiary hearing on whether an actual conflict of interest existed. (Pet. for Cert., 20)

Apparently, Petitioner missed the Court's holding:

> We believe that the actual conflict between Paula and Williams clearly appears on the face of the record. (Pet. for Cert., 23a)

CONCLUSION

Because the questions presented in the petition are not raised in the record, because Petitioner has shown no good cause for this Court to grant certiorari, and because the decision below correctly applies the decisions of this Court to the facts of this case, Respondent respectfully requests that the petition be denied.

Respectfully submitted,

JAMES H. REDDY
Assistant Public Defender
403 Daley Center
Chicago, Illinois 60602
(312) 443-6350

Attorney for Petitioner.

No. 83-1286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DIRECTOR, Illinois Department of Corrections,

Petitioner,

vs.

PAULA GRAY,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Paula Gray, who is now being held in an Illinois penitentiary, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Such leave was granted in the District Court and Appeals Court.

The Respondent's affidavit in support of this motion is attached hereto.

JAMES H. REDDY
Assistant Public Defender
403 Daley Center
Chicago, Illinois 60602
(312) 443-6350

Counsel for Respondent.

No. 83-1286

IN THE

SUPREME COURT OF THE UNITED STATES

DIRECTOR, Illinois Department of Corrections,

Petitioner,

vs.

PAULA GRAY,

Respondent.

AFFIDAVIT

I, PAULA GRAY, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe Petitioner should not be granted a writ of certiorari. I further swear that I am unemployed, having been incarcerated for the last 5 years; that I have received no income in the last 12 months; that I own no cash nor property and have no bank accounts; and that I have no dependents.

I understand that a false statement or answer in this affidavit will subject me to penalties for perjury.

Paula Gray
PAULA GRAY

SUBSCRIBED and SWORN TO
before me this 14th day
of February, A.D. 1984.

Donna R. Brown
NOTARY PUBLIC